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UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK  
Case No. 05-44481 (RDD)

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In the Matter of:

DPH HOLDINGS CORP., et al.,

Reorganized Debtors.

- - - - -x

United States Bankruptcy Court  
300 Quarropas Street  
White Plains, New York

September 22, 2011  
10:09 AM

B E F O R E:  
HON. ROBERT D. DRAIN  
U.S. BANKRUPTCY JUDGE

1  
2 HEARING re Motion For Recoupment on Behalf of Delphi Salaried  
3 Retirees

4  
5 HEARING re Claims Objection Hearing Regarding Claims of Alla  
6 Averbukh, on Behalf of the Estate of Boris Averbukh, as  
7 Objected to in the Reorganized Debtors' Motion for Order (i)  
8 Enforcing Modification Procedures Order, Modified Plan and Plan  
9 Modification Order Injunction and Forty-Seventh Omnibus Claims  
10 Objection Order Against Averbukhs, as Plaintiffs, in Maryland  
11 State Court Wrongful Death Action; and (ii) Directing Averbukhs  
12 to Dismiss Action to Recover Upon Discharged and Expunged Claim  
13 ("Averbukh Injunction Motion")

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25 Transcribed by: Lisa Bar-Leib

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ALSO APPEARING:

JAMES B. SUMPTER

On Behalf of Himself as a Delphi Salaried Retiree  
21169 Westbay Circle  
Noblesville, IN 46062

BY: JAMES B. SUMPTER, PRO SE

1 P R O C E E D I N G S

2 THE COURT: Please be seated. Okay. Good morning.  
3 In re DPH Holdings.

4 MS. HAFLEY: Good morning, Your Honor. Cynthia Haffey  
5 for DPH. Your Honor, we have two agendas for the Court today,  
6 the proposed seventieth omnibus hearing agenda. And on that  
7 agenda, there are no continued or adjourned matters and there  
8 is one contested matter. And that's the motion by James  
9 Sumpter for recoupment on behalf of Delphi salaried retirees.

10 THE COURT: Right.

11 MS. HAFLEY: And I understand that Mr. Sumpter is on -  
12 - joining us today by telephone.

13 THE COURT: Are you on the phone, Mr. Sumpter?

14 MR. SUMPTER (TELEPHONICALLY): Yes, I am.

15 THE COURT: Okay. Good morning.

16 MR. SUMPTER: Good morning.

17 MS. HAFLEY: We also have the proposed forty-eighth  
18 claims hearing agenda. And under "Continued or Adjourned  
19 Matters", Your Honor, there is a claim objections hearing  
20 regarding claims of Ohio Bureau of Workers' Compensation. And  
21 that matter has been adjourned until the November hearing date.

22 There is, under the "Uncontested, Agreed or Settled  
23 Matters", the claims objection hearing regarding claims of ATS  
24 Ohio Inc. ATS Automation Tooling Systems, Inc. and ATS Michigan  
25 Sales and Services, Inc. And that matter has been resolved by

1 the parties, Your Honor.

2 THE COURT: Okay.

3 MS. HAFLEY: The only contested matter today is the  
4 claims objection hearing regarding claim of Alla Averbukh on  
5 behalf of the estate of Boris Averbukh. And I understand that  
6 counsel for the Averbukhs is here present in the courtroom.

7 THE COURT: Okay. So why don't we deal with the  
8 motion by Mr. Sumpter first?

9 MS. HAFLEY: Sounds good, Your Honor.

10 THE COURT: Okay. The parties should assume that I've  
11 read the papers through Mr. Sumpter's reply that was filed, I  
12 guess, yesterday in this matter. So I have that background.  
13 Is Delphi or DPH still making any payments under the various  
14 OPEB plans?

15 MS. HAFLEY: Your Honor, I believe the payments are  
16 being made out of a VEBA trust fund.

17 THE COURT: Under the VEBA?

18 MS. HAFLEY: Yes.

19 THE COURT: And is there -- that's under the  
20 settlement, though, right?

21 MS. HAFLEY: That's correct.

22 THE COURT: Okay. There are no other payments being  
23 made and that's consistent with the fact that the plans were  
24 terminated.

25 MS. HAFLEY: That's correct, Your Honor.

1 THE COURT: Okay. So, Mr. Sumpter, your motion  
2 actually looks for a refund, right, not a crediting against  
3 future payments to you?

4 MR. SUMPTER: I think it asks for both. I will say  
5 this. The disability payments are still being made when you  
6 asked if there were still being payments made by Delphi.

7 THE COURT: But that's under the VEBA settlement,  
8 right?

9 MR. SUMPTER: No. No, it's not, not to my -- no. The  
10 VEBA was created out of the funds that were, I'll say, paid  
11 when the retirees agreed not to follow through with their  
12 appeal. But that had nothing to do with the disability  
13 benefits.

14 THE COURT: But Delphi terminated its disability plan  
15 or plans and the other OPEB plans. So --

16 MR. SUMPTER: No, it did not.

17 THE COURT: -- I don't see how there would be any more  
18 payments coming from Delphi. There might be payments from  
19 insurers or government agencies or if people used the VEBA  
20 settlement to buy a new policy, they would come from that  
21 policy. But I don't think there any checks being cut by Delphi  
22 at this point, right?

23 MR. SUMPTER: Well --

24 THE COURT: You don't get a check from Delphi itself,  
25 do you?



1 MR. SUMPTER: Not from Delphi. But I've been -- prior  
2 to the OPEB benefits being terminated, I received a check from  
3 the administrator which I think it was Metropolitan at the  
4 time.

5 THE COURT: All right. So -- I mean, yes. There were  
6 checks obviously until the OPEB was terminated; Delphi was  
7 cutting checks.

8 MR. SUMPTER: Well, but now I'm receiving checks from  
9 Sedgwick --

10 THE COURT: Okay.

11 MR. SUMPTER: -- who took over Metropolitan.

12 THE COURT: Right.

13 MR. SUMPTER: So -- and I have checked with several  
14 other disability recipients and they are also receiving checks.  
15 Apparently, there are two different organizations that are  
16 paying checks. But a number of people are receiving checks  
17 from Sedgwick.

18 THE COURT: Okay. So it seems to me then that what  
19 you're asking for here is for Delphi or its successor, DPH, to  
20 actually cut a check to make up --

21 MR. SUMPTER: Well, I'm asking -- okay. I'm asking  
22 for two things. One is there is currently an obligation to  
23 reimburse for social security benefits so that if we receive  
24 social security benefits in our disability, we reimburse Delphi  
25 that amount towards that disability.

1 THE COURT: Well, is Delphi looking for Mr. Sumpter to  
2 pay it anything in respect of social security that he's  
3 received? I'm not asking you, Mr. Sumpter. I'm asking  
4 Delphi's counsel.

5 MS. HAFLEY: If it's a credit or an offset, Your  
6 Honor.

7 THE COURT: I'm sorry?

8 MS. HAFLEY: A credit or an offset, Your Honor.

9 THE COURT: But Delphi isn't paying anything to him.  
10 So I don't know why there would be any credit.

11 MS. HAFLEY: It would -- Your Honor, I believe it  
12 would be an offset to the trust account.

13 THE COURT: But the trust account isn't Delphi's.

14 MS. HAFLEY: That's correct.

15 THE COURT: I'm really just focusing on Delphi now.

16 MS. HAFLEY: That's correct, Your Honor.

17 THE COURT: Maybe you want to talk to your -- okay.  
18 So did you want to confirm that with your client?

19 MS. HAFLEY: Please. Thank you.

20 (Pause)

21 MS. HAFLEY: That's correct, Your Honor.

22 THE COURT: What's correct?

23 MS. HAFLEY: That Delphi itself is not expecting a  
24 credit.

25 THE COURT: Or a check --

1 MS. HAFLEY: Or a check.

2 THE COURT: -- from Mr. Sumpter --

3 MS. HAFLEY: That's correct.

4 THE COURT: -- for anything that he got in respect of  
5 payments from another party.

6 MS. HAFLEY: That's correct, Your Honor.

7 THE COURT: Okay. So this is -- so the crediting was  
8 all historical then. The crediting was based on -- was only in  
9 the context of amounts that Delphi owed retirees under the  
10 various OPEB policies. And they would be crediting  
11 historically against that amount. But that's all been done in  
12 the past. There's no more of that to continue in the future as  
13 far as Delphi is concerned.

14 MS. HAFLEY: That is correct, Your Honor.

15 THE COURT: Okay.

16 MR. SUMPTER: Your Honor, may I ask? This is James  
17 Sumpter. I'm just confused about one thing. In the orders  
18 that dealt with the termination of benefits, they did not --  
19 those orders did not reference disability at all. It  
20 referenced health care benefits, health care savings account,  
21 Medicare supplements. But they -- the disability benefits were  
22 not referenced at all in the order or in the motions to  
23 terminate. And so, my -- I've been operating just based on  
24 what I've been living with here in terms of the disability  
25 payments, that that has continued. If they've assigned that to

1 someone else then I have no knowledge of it. They've made us  
2 not aware of that. And the -- I know that people are still  
3 making payments for reimbursing social security.

4 THE COURT: I don't know. That issue wasn't really --  
5 I didn't deal with that issue in preparing for this hearing. I  
6 don't know --

7 MS. HAFLEY: Your Honor, the settlement did terminate  
8 all of Delphi's health and welfare plans which included those  
9 disability benefits.

10 THE COURT: Okay. I mean, it's possible that  
11 disability may be paid through another source, right? There  
12 may be either the substitute plan under the VEBA or some other  
13 insurance but Delphi is not funding that?

14 MS. HAFLEY: That's correct, Your Honor.

15 THE COURT: Okay. All right. Okay. All right.  
16 Again, I have reviewed the papers on this. And that last  
17 discussion dealt with my remaining questions, factual  
18 questions, on this matter. I don't really need additional  
19 argument but if either side wants to make their point or  
20 supplement a point from their papers, you can do so.

21 MS. HAFLEY: Your Honor, if I could just make -- and  
22 point the Court's attention to -- give me one moment -- two  
23 things, Your Honor. In our response, we say that the general  
24 rule is that recoupment is not a claim. But then we cite to  
25 the In re King's Terrace Nursing Home case. Better stated,

1 Your Honor, is that recoupment in the Second District is a  
2 claim. And we have cited that case in our brief. So I just  
3 wanted to point out to the Court that it should have been  
4 stated a little stronger.

5 And to Mr. Sumpter's point in regards to res judicata,  
6 I'd like to point the Court's attention to Corbett v. MacDonald  
7 Moving Services, Inc., 124 F.3d 82 (2nd Cir. 1997). In that  
8 case, the Court states that -- Mr. Sumpter claims that res  
9 judicata isn't present here because the claim basically hadn't  
10 ripened. I think that's in point 5 of his reply brief. The  
11 Court in Corbett states that the claim had been ripe in the  
12 bankruptcy context because, of course, a claim is matured and  
13 unmatured claims, liquidated and unliquidated claims. And I  
14 have a copy of that for the Court.

15 And that's all we have to add, Your Honor.

16 THE COURT: Okay.

17 MR. SUMPTER: And this is James Sumpter. And I have  
18 one issue to raise. When Mr. Chiappetta requested that Your  
19 Honor dismiss my motion, you responded that you would not do  
20 that but he had the option to request a dismissal based on part  
21 7 rule. And you indicated they had been incorporated into  
22 contested matters. And so, looking at that, I amended my  
23 motion to comprehend the rule so that I alleged that this was a  
24 core proceeding. But there's Rule 7012 that makes that same  
25 requirement for the response to the motion. And the response

1 from the debtor did not allege that these proceedings were core  
2 or noncore.

3 And so, my thinking is that their response did not  
4 meet the requirements and should be rejected. And so, I was  
5 asking Your Honor to reject or dismiss their response because  
6 it did not meet the core -- the Rule 7012.

7 THE COURT: Okay. All right. Okay. I have a motion  
8 before me -- it's actually an amended motion although they're  
9 very close, that is the amended motion and the original  
10 motion -- by James Sumpter "for recoupment on behalf of Delphi  
11 salaried retirees". Although the motion is styled as on behalf  
12 of Delphi salaried retirees and not just on behalf of Mr.  
13 Sumpter, he acknowledges in his reply to the debtors' objection  
14 to the motion, "The Movant does not claim to represent or serve  
15 as an attorney for other salaried retirees." And so, I am  
16 treating this motion as a motion solely on behalf of and by Mr.  
17 Sumpter and not on behalf of anyone else who, as Mr. Sumpter  
18 acknowledges, have not authorized him to make the motion on  
19 their behalf.

20 In his motion, Mr. Sumpter argues that he is entitled  
21 to and requests a refund from Delphi in respect of deductions  
22 that Delphi took under various so-called OPEB benefit plans for  
23 retirees for amounts that were due to the beneficiaries of  
24 those plans from third parties, including Social Security  
25 payments and the like, that under the plans acted as a credit

1 against the amounts that Delphi would owe, in essence, to avoid  
2 double counting.

3 The context of this motion is important. Delphi  
4 maintained, pre-bankruptcy and during most of its bankruptcy  
5 case, various OPEB plans for salaried employees and retirees  
6 and their spouses. The debtors moved, however, on February  
7 4th, 2009 seeking the Court's approval to cease contributions  
8 to such plans commencing April 1st, 2009. And on February  
9 2nd -- I'm sorry -- February 25th, 2009, the Court entered a  
10 provisional order granting that relief and then entered an  
11 order on March 11th, 2009 granting the termination motion  
12 pursuant to which the debtors did terminate their OPEB plans.

13 Notwithstanding that order, the Court, recognizing the  
14 uncertainty under the law as well as the potential for a win-  
15 win situation, authorized the appointment of a committee of  
16 retirees to negotiate with the debtor over a potential  
17 resolution of the issues raised by the OPEB termination motion  
18 and the March 11th, '09 order. And the debtor subsequently  
19 entered into a settlement agreement pursuant to which there was  
20 a settlement of the appeal from the termination order as well  
21 as a resolution that appealed that provided for the debtors  
22 paying a considerable sum of nine million dollars which, except  
23 for the part that went to attorneys' fees, went to help fund a  
24 health and benefit plan, so-called VEBA plan that provided for  
25 replacement benefit coverage albeit incomplete replacement

1 benefit coverage.

2           However, with the exception of that settlement,  
3 pursuant to which Delphi committed the money that I've -- or  
4 paid the money that I've just discussed, Delphi ceased, as  
5 authorized by the Court, making any future OPEB payments.

6           Thus, it is clear to me that the relief that Mr.  
7 Sumpter seeks in his motion is -- as generally styled in the  
8 motion, seeking an affirmative recovery from Delphi in the form  
9 of a refund of the amounts that Delphi had previously reduced  
10 OPEB payments by, i.e., the amount paid for the same types of  
11 claims by third parties.

12           The Delphi debtors, later in 2009, specifically on  
13 June 16th, 2009, obtained a bar date order that required that  
14 all administrative claims, that is claims arising from the  
15 commencement of Delphi's Chapter 11 case through June 1, 2009,  
16 be filed by July 15th, 2009 or be forever barred in the case.

17           Subsequently, on July 30th, 2009, Delphi obtained this  
18 Court's approval of confirmation -- on the modification and  
19 confirmation of its modified Chapter 11 plan. That order,  
20 entered by the Court on July 30th, 2009 and referred to by  
21 Delphi and stated in its caption as the "Plan Modification  
22 Order", first incorporates the discharge under Article 11.2 of  
23 the modified plan into the confirmation order. And in  
24 addition, in paragraph 22, the discharge having been  
25 incorporated in paragraph 20 of the plan modification order --



1 in paragraph 22, the plan modification order states, in  
2 relevant part, that "All persons shall be precluded and  
3 permanently enjoined on and after the effective date of the  
4 modified plan from the enforcement attachment collection offset  
5 recoupment or recovery by any matter or means of any judgment  
6 or decree or order or otherwise with respect to any claim,  
7 interest, cause of action or any other right or claim against  
8 the reorganized debtors which they possessed or may possess  
9 prior to the effective date of the Chapter 11 plan."

10 That order is a final order and under Section 1144 of  
11 the Bankruptcy Code cannot be revoked even for fraud by the  
12 plain terms of Section 1144 of the Code.

13 Finally, it should be noted that this Court has  
14 disallowed administrative claims by Mr. Sumpter filed in  
15 respect of his claims for termination of the OPEB plans by  
16 order dated December 2, 2009. In addition, the Court, in  
17 connection with the litigation over the termination of the OPEB  
18 benefits found as moot Mr. Sumpter's motion in this case to  
19 enforce COBRA benefits for salaried retirees and motion for  
20 COBRA settlement. It did that by order dated August 3, 2009.  
21 And in addition, the Court, in an order entered June 27, 2011,  
22 denied Mr. Sumpter's motion for a stay of proceedings regarding  
23 the VEBA in lieu of COBRA.

24 Thus, the record is quite clear that Mr. Sumpter is  
25 barred by res judicata in the form of the Court's prior orders

1 from either (a)challenging the Court's order authorizing the  
2 debtors to terminate the OPEB plans; (b)the VEBA settlement;  
3 and (c)already disallowed administrative claims arising from  
4 the alleged nonpayment or failure to pay OPEB.

5 Mr. Sumpter, in his motion presently before the Court,  
6 contends that his recoupment theory is not covered by the  
7 Court's prior orders in that he is seeking not to have an  
8 administrative claim allowed or an affirmative recovery from  
9 Delphi in respect of the credits that it took when it paid him  
10 in the past OPEB benefits.

11 The debtors disagree and also contend that even if the  
12 legal theory upon which Mr. Sumpter relies is characterized as  
13 recoupment, they contend that he is barred the confirmation  
14 order and the discharge under the law in this district from  
15 asserting even in light of recoupment as opposed to an  
16 affirmative claim.

17 I find and conclude as a matter of law based upon the  
18 facts asserted by Mr. Sumpter and the Court's prior orders and  
19 related documents incorporated into those orders and Mr.  
20 Sumpter's motion that the motion must be denied on the basis of  
21 the following conclusions.

22 First, the plan modification order, by its expressed  
23 terms, as I've already quoted, permanently enjoins any person,  
24 including Mr. Sumpter, from recoupment as well as offset or any  
25 other form of recovery by any manner. It's clear that a

1 bankruptcy court's order confirming a Chapter 11 plan  
2 constitutes a final judgment on the merits and is to be given  
3 preclusive effect under res judicata. In re American Preferred  
4 Prescription, Inc., 266 B.R. 273, 277 (E.D.N.Y. 2000). See  
5 also Sure-Snap Corp. v. State Street Bank & Trust Co., 948 F.2d  
6 869, 872-73 (2nd Cir. 1991) and In re I. Appel Corp., 300 B.R.  
7 564, 567 (S.D.N.Y. 2003) aff'd Katz v. I.A. Alliance Corp., 104  
8 Fed. Appx. 199 (2nd Cir. 2004).

9 While there are conflicting cases as to whether the  
10 proper application of the doctrine of recoupment survives the  
11 discharge under either Chapter 7 or, as in this case, Chapter  
12 11 of the Bankruptcy Code, it is clear that a confirmation  
13 order that specifically enjoins permanently the assertion of  
14 the doctrine of recoupment constitutes res judicata, where that  
15 order is final, as a plan modification order is, and the party  
16 against whom the order is asserted for res judicata purposes  
17 had sufficient notice of it for due process purposes which is  
18 undisputed here. See Daewoo International (America) Corp.  
19 Creditor Trust v. SSTs America Corp., 2003 U.S. Dist. LEXIS  
20 9802 at 17-18 (S.D.N.Y. June 9, 2003) in which District Judge  
21 Buchwald specifically found, as is directly on point here, that  
22 a party that had constructive notice of the bankruptcy case and  
23 confirmation order of the debtor, Daewoo America, was barred by  
24 res judicata from asserting a right of recoupment given the  
25 specific injunction in the confirmation order of the assertion

1 of such a right.

2 So based upon the res judicata effect of paragraph 22  
3 of the plan modification order, Mr. Sumpter's motion should be  
4 denied.

5 In addition, the debtor is correct that at least one  
6 case in this district has held, even in the absence of a  
7 specific provision in the confirmation order enjoining a  
8 recoupment right or the assertion of a recoupment right that  
9 the discharge under Section 1141 of the Bankruptcy Code and the  
10 broad definition of "claim" in Section 101(5) precludes the  
11 assertion of recoupment rights after the confirmation and  
12 effective date of a Chapter 11 plan. See In re King's Terrace  
13 Nursing Home, 184 B.R. 200, 204 (S.D.N.Y. 1995). That is  
14 particularly the case here where the debtor is not picking and  
15 choosing with regard to the provisions of a contract that it  
16 wants to perform and those that it does not want to perform  
17 since, as is the case here, the debtor obtained permission to  
18 terminate its OPEB benefits contracts.

19 Even if I were not to agree with the logic of a King's  
20 Terrace Nursing Home case, moreover, the so-called recoupment  
21 right in Mr. Sumpter's motion is not in fact a proper form of  
22 recoupment for purposes of overcoming a Chapter 11 discharge.  
23 That is because, as I noted earlier, Mr. Sumpter is not  
24 asserting the doctrine of recoupment as it needs to be asserted  
25 on a defensive basis but is rather instead looking for a refund

1 from DPH, as the successor to Delphi, for payments that  
2 allegedly should have been made before the termination of the  
3 OPEB plans. Recoupment -- in other words, he is looking for  
4 DPH to cut a check to him as opposed to credits for future  
5 payments that Delphi or DPH would be making none of which, in  
6 fact, DPH is making or is required to make.

7 Recoupment is a defensive doctrine and not a separate  
8 cause of action or weapon of offense. See In re Drexel Burnham  
9 Lambert Group, Inc., 113 B.R. 830, 854 (Bankr. S.D.N.Y. 1990).  
10 See also Bull v. United States, 295 U.S. 247, (1935).

11 The cases that have the successful assertion of the  
12 recoupment doctrine notwithstanding a debtor's discharge all  
13 involve cases or situations where there are still running  
14 payments to be made to or by the debtor against which credits  
15 can be asserted defensively pursuant to recoupment. On the  
16 other hand, it is clear that where the defense -- where  
17 recoupment is used offensively and not simply as a defense, it  
18 is clearly a claim under Section 101(5) of the Code. And, as  
19 I've noted before, in respect of claims, Mr. Sumpter already  
20 has been determined not to have a timely claim in this case and  
21 his claims have been disallowed. See In re Izaguirre, 166 B.R.  
22 484, 492-93 (Bankr. N.D. Ga. 1994).

23 Thus, the motion should be dismissed on the  
24 alternative ground that it does not rely on a proper that is,  
25 defensive, theory of recoupment but actually asserts a claim

1 that is barred by the Court's prior bar date orders as well as  
2 the discharge under paragraph 20 of the plan modification and  
3 Article 11.2 of Delphi's confirmed and effective Chapter 11  
4 plan.

5 The debtors requested both informally, through an e-  
6 mail to chambers that was cc'd to Mr. Sumpter, as well as  
7 formally, when the Court required the filing of a formal  
8 objection to the motion and hearing, that the Court enter an  
9 order barring Mr. Sumpter from bringing further litigation  
10 against them in respect of the manners that this Court has  
11 already adjudicated by final order. I took this request  
12 seriously. Mr. Sumpter has now raised an attack against either  
13 the OPEB termination motion, the VEBA settlement, which is also  
14 res judicata, and/or the assertion of his claims arising from  
15 the nonpayment of benefits at least three times. And the  
16 debtors' estate clearly should not be further burdened by  
17 attacks arising from the same facts but based upon different  
18 legal theories that either don't fly or that were effectively  
19 dealt with when I previously dealt with such attacks.

20 On the other hand, Mr. Sumpter is pro se. And I do  
21 take that into account in evaluating whether he is acting  
22 improperly or in bad faith in raising legal theories that  
23 clearly have no merit in that they've already been dealt with  
24 by the Court or, alternatively, simply don't make any sense, as  
25 frankly this recoupment theory -- it didn't make any sense. At

1 least, they wouldn't make any sense to a lawyer versed in basic  
2 principles of bankruptcy law. However, Mr. Sumpter isn't a  
3 lawyer so I decided first to treat this matter through written  
4 submissions by the parties and a hearing today. And secondly,  
5 I decided not to enjoin him from bringing further actions.

6 On the other hand, by no means should Mr. Sumpter take  
7 that ruling as a license to bring further actions that are not  
8 premised upon a good faith real argument. The debtors have  
9 their rights under -- in matters before this Court --  
10 Bankruptcy Rule 9011, in matters in the federal district court  
11 or other federal courts under Civil Procedure 11 and in their  
12 corollaries under the various state court procedures for  
13 bringing frivolous or bad faith claims. And Mr. Sumpter is  
14 duly warned that notwithstanding his pro se status, he is on  
15 clear notice that future motions in violation of the -- or  
16 other litigation in violation of the plan modification order or  
17 this Court's prior orders or the Delphi debtors' discharge  
18 under their Chapter 11 plan should merit the imposition of  
19 sanctions. And the debtors can certainly use this transcript  
20 in that regard if such litigation is commenced outside of this  
21 court.

22 So again, for the reasons that I've stated on the  
23 record, the motion's denied as a matter of law under the  
24 equivalent of or based upon the factors applied by the Court  
25 under Bankruptcy Rule 7012 in light of the Court's prior orders

1 and the undisputed facts asserted in the motion.

2 So the debtors or DPH can submit an order to chambers  
3 by e-mail consistent with that ruling.

4 MS. HAFLEY: Thank you, Your Honor.

5 MR. SUMPTER: Your Honor, this is James Sumpter. And  
6 I appreciate the consideration I've gotten. I guess I would  
7 like to tell the Court that my actions have not been intended  
8 to be malicious but a sincere effort for --

9 THE COURT: That's why I ruled the way I have. But I  
10 think you're on notice now, Mr. Sumpter, that I really don't --  
11 unless -- every matter I need to review or some other Court  
12 needs to review on its merits. But you really need to think  
13 very clearly about anything that deep down really does  
14 challenge any of the things that are now approved by a final  
15 order by me.

16 MR. SUMPTER: And I understand that. And I just  
17 wanted to say, though, that I just would -- I don't have the  
18 physical resources to go tilting at windmills. So if you  
19 apprec -- you know, if you understand the kind of effort that I  
20 put into it, I just wouldn't do it if I didn't sincerely --  
21 even if I was wrong -- think that I had a case. But I really  
22 don't anticipate any other action.

23 THE COURT: Okay. Very well.

24 MR. SUMPTER: But could I ask a clarification that is  
25 not intended to challenge a ruling or anything like that? But



1 I am really just still confused on one point. And I'm looking  
2 at the -- what's here -- the filing they requested, the  
3 termination of benefits.

4 THE COURT: Right.

5 MR. SUMPTER: And it eliminates post-paid retirement  
6 health care benefits for current and future. It ceases the  
7 company from making contributions to post-retirement health  
8 care. It cancels all retiree health reimbursement accounts.  
9 For Medicare, it terminates Medicare part B. It stops the one  
10 percent employee contribution to salary retirement savings  
11 program for people hired after a certain date. And it  
12 eliminates retirement for post-retirement basic life insurance.  
13 And those are the only categories that it covers. It does  
14 reference disability at all. And so, that's my confusion.

15 THE COURT: All right. Well, I don't have that before  
16 me, Mr. Sumpter, so I can't really comment on it. What I  
17 recommend is that you speak to the debtor's -- DPH's  
18 representative about it. Maybe they can show you what they  
19 believe covers your disability in that order and/or prior  
20 orders that I entered dealing with COBRA. So I think you know  
21 who to speak to. Have you spoken with them before?

22 MR. SUMPTER: I don't know. There's a transition that  
23 seems to be taking place.

24 THE COURT: Well, there's a gentleman who's here in  
25 the courtroom who deals with claims. You can speak to him

1 about it. Or you can contact the lawyer who spoke today. Why  
2 don't you give him your name, ma'am?

3 MS. HAFHEY: Mr. Sumpter, this is Cynthia Haffey. You  
4 can give me a call at (313)983-7434. I'll be back in the  
5 office on Friday.

6 MR. SUMPTER: All right.

7 THE COURT: And she can point you to the reasons  
8 Delphi believes -- or DPH believes that it terminated validly  
9 the disability -- its obligation to pay disability payments.  
10 Okay?

11 MR. SUMPTER: Okay.

12 THE COURT: All right. Thank you very much.

13 MR. SUMPTER: Thank you.

14 THE COURT: Okay. So that leaves DPH's motion to  
15 enforce the plan injunction and the discharge against the  
16 Averbukh plaintiffs.

17 MR. KLEIN: Yes, Your Honor. Sheldon Klein of Butzel  
18 Long on behalf of DPH reorganized debtors.

19 MR. STEINBERG: Good morning, Your Honor. Rick A.  
20 Steinberg of Ciardi Ciardi & Astin for Vladimir Averbukh and  
21 Alesander Averbukh.

22 THE COURT: Okay. You -- both sides should assume  
23 that I've read the papers on this through DPH's reply to the  
24 Averbukh's response to their motion. I don't think there's  
25 been anything after that filed.

1 MR. STEINBERG: No, Your Honor.

2 THE COURT: Okay. All right. I guess I'm a little  
3 puzzled on at least one point because I don't think there was  
4 really a response on this point. Leaving aside for the moment  
5 the argument that DPH makes that the Averbukhs are bound by the  
6 confirmation order and the plan and, in particular, paragraphs  
7 20 and 22 of the confirmation order -- or the plan modification  
8 order as well as the administrative claims bar date order on  
9 the theory that they got notice for due process purposes either  
10 by publication or by notice to the law firm or both.

11 There was an order entered by me some time ago  
12 disallowing Mrs. Averbukh's claim as being untimely. And I  
13 didn't really see any response to that argument that the  
14 Averbukhs are bound by that order.

15 MR. STEINBERG: Well, Your Honor, that claim was filed  
16 in the name of Alla Averbukh. We don't even represent Alla  
17 Averbukh. So representing Vladimir and Alesander, I would make  
18 a few points in that regard. First of all, that claim was  
19 specifically filed as an administrative claim.

20 THE COURT: Right.

21 MR. STEINBERG: Second of all, Alesander and Vladimir  
22 did not receive notice of the claim objection. Even for sake  
23 of argument you're talking about only the notice that was sent  
24 to The Kuhlman Law Firm, that is the claims objection that was  
25 sent to The Kuhlman Law Firm in regard to the Alla Averbukh

1 claim. That claim was only filed on her behalf not on behalf  
2 of Vladimir and Alesander.

3 THE COURT: But isn't Maryland's one-form-of-action  
4 rule designed specifically to cut short that type of argument?

5 MR. STEINBERG: Well, Your Honor, I think that part of  
6 the problem is that the cart has been placed before the horse,  
7 which is there's a determination or an attempt to determine a  
8 claim -- or whether a claim exists before the claim has even  
9 been liquidated. The movants, or I should say the cross-  
10 movants, Vladimir and Alesander, are seeking to be allowed to  
11 liquidate their claim. And one thing that I think has been  
12 lost or ignored, certainly at least glossed over if not  
13 completely ignored, is that the cross-movants, Alesander and  
14 Vladimir, should have the right to be able to liquidate their  
15 claim for whatever it's worth.

16 THE COURT: Why if it's barred?

17 MR. STEINBERG: Well --

18 THE COURT: Why should the debtors be forced to go  
19 through that and spend the money to do that if it's already  
20 barred by (a) the administrative bar date order; (b) the  
21 confirmation order; and (c) the order from May 2010 disallowing  
22 Alla Averbukh's claim?

23 MR. STEINBERG: Well, Your Honor, as Your Honor knows  
24 under Second Circuit law, it is very common for a personal  
25 injury wrongful death action to proceed only in the event that

1 there may be insurance proceeds in order to have a liquidated  
2 claim.

3 THE COURT: But you're not offering that.

4 MR. STEINBERG: Well, in this instance, Your Honor,  
5 while we don't represent the Averbukhs in the wrongful death  
6 action, my information is that Delphi had supposedly answered  
7 an interrogatory stating that there was no insurance available.  
8 However, I don't believe that that alone would -- should bar  
9 being able to liquidate a claim in the event that there is  
10 somehow some insurance that would cover a claim. And how  
11 else --

12 THE COURT: But again, the plaintiffs aren't  
13 offering -- that's not even in the mix here. The Averbukhs  
14 aren't -- there's nothing in the papers saying that the  
15 Averbukhs are willing to waive their claims against Delphi and  
16 indemnify Delphi as against any cost in the litigation that  
17 proceeds solely against insurance.

18 MR. STEINBERG: Well, I'm not saying that they would,  
19 Your Honor. I would have to get authorization --

20 THE COURT: All right. So I'm assuming that you're  
21 looking to do more than that and you're looking to establish a  
22 claim so that it can be enforced against DPH.

23 MR. STEINBERG: Well, Your Honor, I think that it may  
24 also be that it's necessary to have the Delphi defendants in  
25 the wrongful death action in order to properly present the

1 case. Again, I don't represent them in that action. But it  
2 does seem that it would be a hindrance to liquidating the claim  
3 -- or prosecuting the wrongful death action against any  
4 defendant to not have, at least as nominal defendants, the  
5 Delphi defendants.

6 THE COURT: They're not listed as nominal defendants  
7 and you're not seeking to precede them. And I'm assuming that  
8 the law firm's response to Delphi's request to obey the  
9 discharge and plan injunction and the May 2010 order didn't say  
10 that we're only looking to name you as nominal defendants and  
11 we will not -- we will limit our recovery to available  
12 insurance.

13 MR. STEINBERG: Well, again, Your Honor, I think it's  
14 putting the cart before the horse.

15 THE COURT: No, it isn't. The cart is -- you're doing  
16 just that. You have to deal with the facts that your clients  
17 were faced with just as people have to deal with the automatic  
18 stay. And the facts your clients were faced with in addition  
19 to the bar date order and the modified plan confirmation order  
20 is the fact that there was an order entered in May 2010  
21 disallowing Alla's claim. So I want to go back to my original  
22 question. I didn't see any response contradicting the debtors'  
23 position that Maryland Code 3904 means that the other  
24 plaintiffs are now barred by the disallowance of Alla's claim.

25 MR. STEINBERG: Well, Your Honor, I can't really

1 speak --

2 THE COURT: You're Vladimir and Alesander.

3 MR. STEINBERG: I can't really speak to what the  
4 effect under Maryland would be in the wrongful death action  
5 itself. Alesander and Vladimir's position is that they didn't  
6 file the claim that was expunged and that the issue of what  
7 Maryland law entitles them to is not really a question of  
8 bankruptcy law to be determined at this juncture.

9 THE COURT: Why not? It's my order. May 2010  
10 disallows her claim. If the effect of disallowing that claim  
11 is also to render as a matter of res judicata, statutory res  
12 judicata, the claims of anyone else under the -- in respect of  
13 this accident relating to the death of a person barred then  
14 that's it. It's a matter of res judicata. And I can certainly  
15 determine that issue. It's my order.

16 MR. STEINBERG: Well, Your Honor --

17 THE COURT: It's statutory res judicata.

18 MR. STEINBERG: I can't speak specifically to the  
19 question of Maryland law and --

20 THE COURT: All right. Well, I mean, the debtors.  
21 And there was a timely reply. And I guess the answer is  
22 there's no response. So, to me, it seemed to me the debtors  
23 were right on that point. But -- okay.

24 So let's move on to the other defenses. Why isn't  
25 publication notice sufficient here?

1 MR. STEINBERG: Well, first of all, Your Honor, I  
2 think we have to step back and remember which notices we're  
3 talking about. You're talking obviously now of the bar date.  
4 Again, it's conceded by the debtors that there was no written  
5 notice.

6 THE COURT: All right.

7 MR. STEINBERG: It's the cross-movants' position that  
8 the debtors -- the reorganized debtors, by the time of the  
9 fixing of the bar date, had notice or should have or could have  
10 through diligence obtained information that would have put them  
11 on notice as the debtors of a claim or a potential claim --

12 THE COURT: On what basis?

13 MR. STEINBERG: Well, the accident --

14 THE COURT: The law suit itself was filed after the  
15 bar date, right?

16 MR. STEINBERG: Well, the accident occurred in 2007.

17 THE COURT: Well, was there any notice given to the  
18 debtors of the occurrence of the accident?

19 MR. STEINBERG: Your Honor, I don't know -- again, not  
20 having handled the wrongful death action, I don't know what  
21 kind of pre-action notice may or may not have --

22 THE COURT: There's no assertion in the objection of  
23 the debtors' motion that there was any such notice to the  
24 debtors of the accident.

25 MR. STEINBERG: Well, the facts of the case is that it



1 was a rental car rented by Enterprise Rental Car. And I would  
2 think that Enterprise Rental Car had some kind of not just  
3 responsibility but desire to advise General Motors and/or  
4 Delphi and/or other parties that there had been some kind of  
5 accident where there was a failure of the airbag -- alleged  
6 failure of the airbag.

7 THE COURT: Well, this is just pure speculation,  
8 right?

9 MR. STEINBERG: I don't know, Your Honor.

10 THE COURT: Okay. All right.

11 MR. STEINBERG: But you asked specifically about the  
12 notice and the --

13 THE COURT: Right.

14 MR. STEINBERG: -- publication notice.

15 THE COURT: Right.

16 MR. STEINBERG: And the point I was going to make  
17 about the bar date -- you know, we're talking about two  
18 different notices in terms of the claims objection and the bar  
19 date. There's no dispute that there was no written notice of  
20 the bar date to any of the Averbukhs. And as to the claim  
21 objection itself, Your Honor, again, I reiterate that the  
22 notice of the claim objection, or the claim objection itself,  
23 was only served on -- or was in relation to the claim filed by  
24 Alla not a claim filed by Alesander or Vladimir.

25 THE COURT: Okay. And the administrative expense

1 claim was filed also after the plan modification order was  
2 entered, right?

3 MR. STEINBERG: Yeah. Shortly thereafter. A few  
4 months, Your Honor.

5 THE COURT: Right. Okay. So again, there's nothing  
6 to suggest that when that order was entered, which contained  
7 the discharge provision and the permanent injunction, the  
8 debtors were on notice of the lawsuit because the lawsuit was  
9 brought a few months after the plan modification order was  
10 entered?

11 MR. STEINBERG: You're saying is there some basis?

12 THE COURT: Right.

13 MR. STEINBERG: I don't know, Your Honor, what  
14 information was or was not transmitted in some form to the  
15 debtors or to anyone else, say Enterprise Rental Car, General  
16 Motors. That is the answer. I don't know what information, if  
17 any, was provided to them and how.

18 THE COURT: Okay. But the accident itself happened in  
19 2007.

20 MR. STEINBERG: Yes, Your Honor.

21 THE COURT: And it was the airbag malfunctioned is  
22 what is claimed, right?

23 MR. STEINBERG: Yes.

24 THE COURT: So there was over a year to notify  
25 Delphi -- the plaintiffs or their counsel had over a year to

1 notify Delphi that they thought they had a claim, right?

2 MR. STEINBERG: Well, I understand what the chronology  
3 is, Your Honor. Again, I don't know what notification was or  
4 was not given.

5 THE COURT: All right. But there's no assertion that  
6 the law firm or the Averbukhs notified Delphi.

7 MR. STEINBERG: Not that I'm aware, no.

8 THE COURT: Okay. All right. So I guess I don't  
9 understand why even assuming that the Maryland one-action rule  
10 doesn't apply here, why the claims of the other plaintiffs or  
11 the other alleged injured parties, Vladimir and Alesander,  
12 including in the capacity as administrators of Boris' estate,  
13 aren't barred by the administrative claims bar date or the  
14 discharge order.

15 MR. STEINBERG: Well, again, Your Honor, it's the  
16 cross-movants' position that they did not receive notice of the  
17 bar date or --

18 THE COURT: Let's assume for the moment that there was  
19 appropriate constructive notice. Is there any other argument?

20 MR. STEINBERG: You're talking about of the bar date  
21 or of the --

22 THE COURT: Either one.

23 MR. STEINBERG: Well, again, Your Honor, I believe  
24 that the cross-movants should be allowed to prosecute the  
25 wrongful death action in the court of jurisdiction to determine

1 what they have. I mean, I was going to say liquidated claim.  
2 But again, I think that the wrongful death action really is a  
3 separate proceeding that has to be allowed to proceed and then  
4 a determination would be made as to the status of any --

5 THE COURT: But it's specifically enjoined by the  
6 statutory discharge as well as the Court's order. It's not  
7 just enforcement but proceeding. The whole point is that it's  
8 barred. The action itself is barred. I mean, that's what the  
9 order says and that's what the Code says, you know, 1141.

10 MR. STEINBERG: I understand what you're saying, Your  
11 Honor.

12 THE COURT: Okay. I guess, I didn't understand the  
13 argument why it was relevant whether or not it was an  
14 administrative claim. Isn't it just worse for you if it's not  
15 an administrative claim? Then it was barred even earlier.

16 MR. STEINBERG: The point is, Your Honor, the  
17 plaintiffs cite to -- the plaintiffs, that is, in the wrongful  
18 death action cite to a similar case in the western district of  
19 Texas in the district court.

20 THE COURT: In that case -- you're referring to the  
21 Smith case, right?

22 MR. STEINBERG: Yes, Your Honor.

23 THE COURT: In that case, the judge specifically found  
24 that the debtor knew on the existence of the injury and  
25 therefore needed to provide actual notice instead of

1 constructive publication notice. The other statement in there  
2 that it wasn't an administrative claim is really dicta. It  
3 doesn't make any sense. It certainly was a claim that arose in  
4 the Smith case and in your case before some bar date whether  
5 it's an admin bar date or even earlier, a pre-petition claims  
6 bar date arose before the bar date. But the whole point of  
7 that very brief opinion, which is attached as Exhibit B to your  
8 papers, is that the debtor had to provide actual notice because  
9 it says first "Despite knowing of plaintiff's suit, Delphi  
10 concedes that it did not mail a notice of either the initial or  
11 file an administrative claims bar date. Notice by publication  
12 does not suffice when the claimant is known" which is  
13 absolutely right. I agree with that.

14 MR. STEINBERG: Yes, Your Honor. Again, it's the  
15 cross-movants' position that they should be -- assuming for the  
16 sake of argument that their claim is deemed to be the same as  
17 the Alla Averbukh claim that was expunged, that they should be  
18 relieved of that order for the reasons previously stated, that  
19 is the lack of notice -- written notice of the bar date and the  
20 lack of notice to them of the claim objection. And so, while  
21 the issue of the administrative --

22 THE COURT: Well, but wasn't the claim objection sent  
23 to their counsel? There's no dispute about that, right?

24 MR. STEINBERG: The claim objection was sent to The  
25 Kuhlman Law Firm, yes.

1 THE COURT: And that was the address on the proof of  
2 claim.

3 MR. STEINBERG: I believe so, Your Honor.

4 THE COURT: So that doesn't really fly, right?

5 MR. STEINBERG: Well, Your Honor, the point is that  
6 the circumstances of this case warrants relief from the order  
7 not -- for the sake of argument, assuming that the notice was  
8 sent to The Kuhlman Law Firm as alleged by the reorganized  
9 debtors that the cross-movants are entitled to relief from the  
10 order expunging the claim for the reasons stated.

11 THE COURT: But why?

12 MR. STEINBERG: Well, again --

13 THE COURT: Why should they be relieved from an order  
14 that was entered in May of 2010 --

15 MR. STEINBERG: Well, they weren't --

16 THE COURT: -- particularly when they chose to proceed  
17 in the face of an injunction --

18 MR. STEINBERG: Well, they weren't --

19 THE COURT: -- and a warning that they were violating  
20 an injunction and a discharge order.

21 MR. STEINBERG: Because Vladimir and Alesander did not  
22 file a claim. And while I can't speak for The Kuhlman Law  
23 Firm, they were not the named claimants. And they're --

24 THE COURT: What was the rationale given by them for  
25 proceeding in violation of the discharge --

1 MR. STEINBERG: I do not know, Your Honor.

2 THE COURT: I honestly do not understand it. It seems  
3 to me when you see an injunction as a -- that before you run  
4 the risk of violating it under these circumstances, you see  
5 relief from it. And at that point, you seek relief either  
6 because you think it doesn't apply or -- under Rule 60  
7 although, of course --

8 MR. STEINBERG: Well --

9 THE COURT: -- you couldn't do it under Rule 60  
10 because it's barred by the express terms of Rule 9024 which  
11 modifies Rule 60 in bankruptcy cases to limiting the challenges  
12 or revocation of a confirmation order to the 180 days after the  
13 entry of such an order and then only for fraud. So obviously,  
14 they couldn't have done that. So I don't see why they're not  
15 bound by the discharge --

16 MR. STEINBERG: Well, Your Honor, again --

17 THE COURT: -- unless it's a theory that they didn't  
18 have proper due process notice.

19 MR. STEINBERG: Well, as we stated in the papers, Your  
20 Honor, that is our position that they did not have --

21 THE COURT: Okay.

22 MR. STEINBERG: -- proper notice.

23 THE COURT: All right. Okay. Anything on the  
24 debtors' side?

25 MR. KLEIN: Nothing, Your Honor.

1 THE COURT: Okay. I have before me a motion by the  
2 debtors -- or the reorganized debtors, DPH Holdings Corp., to  
3 enforce the order entered by this Court on July 30th, 2009, the  
4 so-called plan modification order which confirms the modified  
5 plan of the Delphi debtors. Specifically, the motion seeks to  
6 enforce paragraphs 20 and 22 of the plan modification order.  
7 The first paragraph, paragraph 20, incorporates into the  
8 confirmation order the discharge of the Delphi debtors found in  
9 paragraph -- or Article 11.2 of Delphi's first amended plan as  
10 modified under Section 1141(d) of the Bankruptcy Code which  
11 discharges all pre-effective date, that is pre the date when  
12 Delphi's modified plan went effective, claims and causes of  
13 action, whether known or unknown, whether fixed or unliquidated  
14 against the Delphi debtors.

15 Paragraph 22 of the plan modification order is a  
16 permanent injunction of all persons on or after the effective  
17 date from commencing or continuing in any manner any claim,  
18 action, appointment of process or other proceeding of any kind  
19 with respect to any claim, cause of action or any other right  
20 or claim against the reorganized debtors which they possess or  
21 may possess prior to the effective date, again, the effective  
22 date of the confirmed modified plan.

23 The reorganized debtors seek to enforce those two  
24 provisions of the July 15th -- I'm sorry -- the July 30th, 2009  
25 order against the plaintiffs in a personal injury lawsuit



1 commenced in September of 2009 by Vladimir and Alesander  
2 Averbukh and naming Alla Averbukh as a use party in Maryland  
3 state court based on the wrongful death of Boris Averbukh in a  
4 car accident that occurred in 2007.

5 Those dates are important. The accident occurred in  
6 2007. The lawsuit was commenced in September of 2009 after the  
7 effective date of Delphi's modified plan. And in addition, the  
8 car accident occurred, as I said, in 2007 during the pendency  
9 of Delphi's Chapter 11 case which began in October of 2005.  
10 The accident also occurred in the period from October 2005  
11 through June 1, 2009 covered by the Court's order establishing  
12 administrative claims bar date in Delphi case of July 15th,  
13 2009 by which to assert any administrative claims falling  
14 within that period.

15 The record reflects that the first time that Delphi  
16 was aware of the lawsuit was when it was commenced, in  
17 September of 2009. In addition, in November of 2009 -- I'm  
18 sorry. I've gotten my dates wrong.

19 The first time that Delphi was aware of the claim was  
20 when Alla Averbukh filed a proof of administrative claim in  
21 September of 2009, approximately forty-eight days after the  
22 administrative claims bar date. The lawsuit was not commenced  
23 until November of 2009 by Boris' estate with his two sons,  
24 Vladimir and Alesander, with Alla named as a use party. So to  
25 be clear, Delphi was not aware, on this record before me, of

1 the existence of the car accident or the claim until Alla filed  
2 her administrative expense claim after the administrative  
3 claims bar date in September of 2009, the lawsuit itself not  
4 being commenced until November of 2009.

5 The reorganized debtors objected to Alla Averbukh's  
6 proof of claim as being untimely. And in May of 2010, this  
7 Court entered an order disallowing and expunging that claim.  
8 The debtors also made demand of the Averbukhs and their counsel  
9 thereafter to discontinue the Maryland state court action on  
10 the basis that it was in violation of the plan modification  
11 order, the debtors' discharge and now also as well in violation  
12 of the May 2010 order disallowing Alla's claim. The basis for  
13 the latter assertion is Maryland Courts and Judicial  
14 Proceedings Code Ann. Section 3-904 (2011) which restricts  
15 actions in respect of the death of a person, that is wrongful  
16 death actions like the Maryland state court action, to only one  
17 action. The debtors contend that since Alla's claim premised  
18 upon the wrongful death of Boris was disallowed by this Court  
19 in May of 2010, the parties to the Maryland wrongful death  
20 action are now barred by statutory res judicata or claim  
21 preclusion by Section 3-904.

22 The plaintiffs in the wrongful death action did not  
23 cease the action nor did they cease -- nor did they seek relief  
24 from the Court's bar date order, the Court's plan modification  
25 order or the Court's order from May 2010 disallowing Alla's

1 proof of claim. Instead, the debtors were forced to bring this  
2 motion to enforce all of those orders.

3 In response, the claimants assert effectively, or  
4 really, only one issue which is that they did not receive  
5 sufficient notice for due process purposes of any of the orders  
6 that the debtors contend bar, as a matter of res judicata,  
7 their continued prosecution of the state court lawsuit.

8 It is, of course, the case that to be enforceable, an  
9 order, including a discharge order, must comply with due  
10 process under the Fifth Amendment. See, for example, In re  
11 Enron Corporation, 2006 Bankr. LEXIS 894 at 12 (Bankr. S.D.N.Y.  
12 March 29, 2006) and In re Thomson McKinnon Securities, Inc.,  
13 130 B.R. 717, 719-20 (Bankr. S.D.N.Y. 1991).

14 The case law is clear that for known claimants,  
15 claimants known to be such by the debtor, the debtor must  
16 provide actual notice of a bar date and/or a proposed  
17 confirmation order that would effectuate a bankruptcy  
18 discharge. However, for unknown claimants, the debtor need  
19 provide notice reasonably calculated to reach them and  
20 permitting a reasonable amount of time for response and  
21 reasonably conveys all of the required information. Such  
22 notice, again for an unknown creditor, may be made by  
23 publication. See Mullane v. Central Hanover Bank & Trust Co.,  
24 339 U.S. 306, 314, 317 (1950). See also Daewoo International  
25 America Corp. Creditor Trust v. SSTs America Corp., 2003 U.S.

1 Dist. LEXIS 9802 at 7-10 (S.D.N.Y. June 9, 2003); In re Thomson  
2 McKinnon Securities, Inc., 130 B.R. at 719-20; and see also  
3 Chemetron Corp. v. Jones, 72 F.3d 341, 346 (3rd Cir. 1995) as  
4 well as In re J.A. Jones, Inc., 492 F.3d. 242 (4th Cir. 2007)  
5 making a distinction between a known personal injury claimant  
6 who's entitled to actual notice and unknown personal injury  
7 claimants who are entitled to reasonable publication notice.

8 Here, the record is undisputed that the debtors  
9 provided publication notice to unknown claimants on a wide  
10 basis that was previously approved by the Court and the actual  
11 content of that notice or its reasonableness are not in  
12 dispute. There's also nothing in the record to refute the  
13 obvious facts from the dates that I went through that the  
14 debtors were not aware of this claim until it was filed by Alla  
15 in November of 2009 after the entry of the administrative  
16 claims bar date order and the modified plan confirmation order  
17 and then subsequently when the litigation was commenced by  
18 Alesander and Vladimir naming Alla in November of 2009.

19 In light of the foregoing, I conclude that there was  
20 sufficient notice for due process purposes under Mullane and  
21 the cases that I've cited and that consequently, the claims  
22 asserted by the plaintiffs in the Maryland action are barred by  
23 the debtors' discharge under Section 11.2 of the plan and  
24 paragraph 20 of the plan modification order as well as the  
25 permanent injunction set forth in paragraph 22 of the plan

1 confirmation order. In addition, they are barred, as I've  
2 already found and as is law of the case, by my order of May  
3 2010 disallowing Alla's proof of administrative expense claim  
4 in this case as being untimely.

5 The plaintiffs in the Maryland state action seek  
6 relief from "the Court's relevant orders" in their response to  
7 the debtors' motion under Bankruptcy Rule 9024 which  
8 incorporates Federal Rule of Civil Procedures 60. They are  
9 precluded by the express terms of Bankruptcy Rule 9024,  
10 however, from seeking relief from the plan modification order  
11 given that Section 1144 of the Bankruptcy Code is an exception  
12 expressly in Bankruptcy Rule 9024. And Section 1144 provides  
13 that a party may seek revocation of a plan confirmation order  
14 until 180 days after the entry of that order but if, and only  
15 if, the order was procured by fraud which is not asserted here.

16 In addition, other than the issue of notice, which  
17 I've already addressed, no grounds are raised for relief from  
18 the bar date order which is now over two years old and which  
19 the Averbukhs had notice of, as well as their law firm, at  
20 least as of the date of the debtors' objection to Alla's proof  
21 of claim which, again, I granted in May of 2010 in which has  
22 not sought to have overturned since then. So there really is  
23 no basis for such requested relief even from the bar date order  
24 under Bankruptcy Rule 9012 nor any specific fact alleged other  
25 than the issue of notice which I've already dealt with as

1 giving a basis for such relief.

2 Finally, as an alternative ground, I believe that the  
3 debtors are correct that leaving aside the res judicata effect  
4 and binding effect given my belief that the Averbukhs received  
5 sufficient notice for due process purposes of the plan  
6 modification order and the discharge is the fact that, as a  
7 result of my May 2010 order disallowing Alla's claim based on  
8 the wrongful death that is also the basis for the Maryland  
9 state action, Maryland Courts and Judicial Proceedings Code  
10 Ann. Section 3-904 precludes, as a matter of statutory res  
11 judicata, Alesander and Vladimir proceeding with the action  
12 that has already been effectively ruled on by me in May of 2010  
13 by disallowing Alla's wrongful death claim.

14 So the debtors' motion is granted on those separate  
15 alternative grounds. I frankly don't even understand the  
16 contention that was made at oral argument that the debtor  
17 should permit the Averbukhs to liquidate their claim in  
18 Maryland state court in the face of the discharge and the  
19 injunction in paragraph 22 of the plan modification order which  
20 expressly prohibits the commencement or continuation of any  
21 proceeding in respect of any claim arising before the effective  
22 date. That's why a debtor gets a discharge in a plan  
23 confirmation order and that's why a debtor gets a bar date  
24 order which these parties were clearly in violation of by  
25 asserting pre-effective date claims which these claims clearly

1 are under Reading Company v. Brown, 391 U.S. 471 (1968) and In  
2 re Refco Inc., 2008 U.S. Dist. LEXIS 2484 at 17 (S.D.N.Y.  
3 January 14, 2008).

4 So the debtors can submit an order consistent with  
5 that ruling.

6 MR. KLEIN: Your Honor --

7 THE COURT: It's without prejudice to the debtors'  
8 rights to seek sanctions for violation of the Court's orders.

9 MR. KLEIN: And this may be implicit in your last  
10 remark but I would ask that the order include a mandatory  
11 injunction directing them to dismiss the Maryland action so we  
12 don't have to incur the costs of doing anything beyond this.

13 THE COURT: Well, that's appropriate.

14 MR. STEINBERG: Your Honor, if I may, there was an  
15 order -- proposed order submitted by the reorganized debtors  
16 with their motion. I'm not sure if they want a different order  
17 than that.

18 THE COURT: I want a different order than that. It's  
19 my order. I don't understand why this law firm didn't comply  
20 with the debtors' request in the first place. I know you're  
21 saying you're not really involved with that so I'm not really  
22 addressing this so much to you as to them. But this was just a  
23 clear violation. I don't know what they were thinking.

24 MR. STEINBERG: Thank you, Your Honor.

25 THE COURT: Okay.

1 MR. KLEIN: Thank you, Your Honor.

2 MS. HAFHEY: Thank you, Judge.

3 THE COURT: Oh, I'm sorry. And this doesn't relate to  
4 you. You may not even be aware of this. I had asked my clerk  
5 because of a letter I had gotten to give me an update -- I  
6 asked my clerk to ask someone at Skadden to give me an update  
7 on the status of the Michigan Workers' Compensation matter  
8 that's now on appeal to the Second Circuit. And the reason I  
9 did that is I had received a letter from a former employee in  
10 Michigan who said that the Michigan Insurance Fund wasn't  
11 paying any workers' comp benefits. And I didn't really  
12 understand why that should be the case. And I wanted to make  
13 sure that the Skadden firm had the letter. And Mr. Lyons sent  
14 an e-mail to chambers in response to that inquiry saying that  
15 he was aware of it, the debtors were aware of it, and that the  
16 debtors didn't believe that anything in the plan or the  
17 confirmation or anything else precluded or prevented the  
18 Michigan regulatory bodies from paying those claims.

19 If that's the case, I think that the debtors would be  
20 well advised to so inform the Michigan parties as well as this  
21 individual. I don't want a misunderstanding or potential  
22 misunderstanding by the Michigan parties, Michigan regulatory  
23 authorities, to get in the way of people getting their actual  
24 benefits that they're entitled to under Michigan law. So I  
25 don't know if the debtors have done that, but I think it's



1 probably worth doing. I'm not telling you to compromise any  
2 rights you have if you think that sending such a letter  
3 compromises some right. But it seemed from Mr. Lyons' response  
4 that the debtors don't believe that.

5 MR. UNRUE: That's correct, Your Honor.

6 THE COURT: Okay.

7 MR. UNRUE: This was Mr. Gai, I believe. I'm not sure  
8 how to pronounce it.

9 THE COURT: That was the letter, yeah.

10 MR. UNRUE: Yeah. And we'll be responding.

11 THE COURT: Okay. And the Michigan people -- I mean,  
12 the Michigan regulators should be copied on that letter because  
13 I don't want there to be any implication that I'm precluding  
14 them from making those payments.

15 MR. UNRUE: Understood.

16 THE COURT: And notwithstanding the appeal, there's no  
17 injunction of my order. So if Michigan is taking the position  
18 that they're precluded somehow from doing that by the  
19 litigation, the litigation should proceed quickly in front of  
20 me although I understand the appeal is going to be argued soon.  
21 But there's no reason to delay that litigation if it's holding  
22 up people's payments.

23 MR. UNRUE: Okay.

24 THE COURT: Okay.

25 MR. UNRUE: Thank you, Your Honor.

1 THE COURT: And obviously, no one's here from  
2 Michigan. Mr. Lyons isn't here. You can tell them that they  
3 can read this portion of the transcript if they --

4 MR. UNRUE: Yep. Absolutely.

5 THE COURT: -- have any questions about it.

6 MR. UNRUE: Thank you, sir.

7 THE COURT: Okay.

8 MS. HAFLEY: Thanks, Judge.

9 THE COURT: Thanks.

10 (Whereupon these proceedings were concluded at 11:49 a.m.)  
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I N D E X

R U L I N G S

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C E R T I F I C A T I O N

I, Lisa Bar-Leib, certify that the foregoing transcript is a  
true and accurate record of the proceedings.

**Lisa Bar-Leib**

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**LISA BAR-LEIB**

**AAERT Certified Electronic Transcriber (CET\*\*D-486)**

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**Date: September 26, 2011**